SUPREME COURT, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-1443

UNIVERSITY OF HOUSTON,
LAMAR UNIVERSITY, ET AL.,
Petitioners

VS.

MARVIN A. WURZER, ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Petitioners, University of Houston, Lamar University, et al., pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 7, 1973.

OPINION BELOW

The Opinion of the Court of Appeals for the Fifth Circuit reversing and remanding the Judgment and Order of the District Court for the Southern District of Texas is reprinted in the Appendix, infra, pp. 1a to 4a. A Petition for rehearing was denied by the Court of Appeals on December 28, 1973, and the notice of said Order to all Counsel of record is reprinted in the Appendix, infra, pp. 5a. The Order of the District Court for the Southern District of Texas which was reversed and remanded is reprinted along with notice of the Court's Calendar ruling in the Appendix, infra, pp. 6a. The Memorandum Opinion of the Three-Judge Court in *Weaver v. Kelton, et al,* Civil Action No. 7784 (E.D. Tex. 1973) cited in Trial Court's Order is reprinted in the Appendix, infra, pp. 9a to 19a.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 7, 1973. This Court has jurisdiction of this Petition for Writ of Certiorari pursuant to 28 U.S.C., Section 1254 (1) and (2).

QUESTIONS PRESENTED

Where the laws of the State, which are challenged in the complaint on constitutional grounds, have been re-

cently upheld as constitutionally valid by a Three-Judge Court and by the United States Supreme Court in a recent similar case, is the District Court judicially in error to dismiss the complaint on the basis that no substantial federal question remains to be decided?

Does an alleged misapplication of valid Texas Statutes, which prescribe resident requirements for tuition purposes in Texas State Colleges, constitute a violation of Plaintiff-Respondents' Constitutional rights such as to present a substantial federal question for the determination of a Three-Judge Court?

STATEMENT OF THE NATURE OF THE CASE

The Complaint was brought by student-plaintiffs attenting the University of Houston and Lamar University against these institutions of higher learning which are official agencies of the State of Texas. The Complaint prays on page 20 thereof "That a declaratory judgment issue declaring that sections 54.051 through 54.056 of the Education Code of the State of Texas, are void as violating the Constitution of the United States insofar as the same are written and applied to plaintiffs and to the classes which they represent." *The Complaint further prays that "in the event the statute (Article 54.052 of the Texas Education Code) should be declared constitutional and valid—that the Court declare the statute unconstitutional as applied to each plaintiff . . ."*

The Defendants filed a Motion to Dismiss on the grounds that no substantial federal question was presented by the Complaint; that a same or similar complaint had been decided adversely to Plaintiffs just a month before in *Weaver v. Kelton* by a Three-Judge Court in Beaumont where party-Defendant herein Lamar University was the Defendant. The Memorandum Opinion of the Three-Judge Court in *Weaver v. Kelton, et al,* C.A. No. 7784 (E.D.Tex. 1973) is reprinted in the Appendix, infra, pp. 9a to 19a, and also *Starnves v. Malkerson*, 326 F.Supp. 234 (D.Minn. 1970), aff'd without opinion, 401 U.S. 985 (1971). Defendants Motion to Dismiss was unopposed by Plaintiffs and the District Court granted same citing the above two cases from which Order this appeal was made.

The Court of Appeals for the Fifth Circuit reversed and remanded the case for the empaneling of a Three-Judge Court.

REASONS FOR GRANTING THE WRIT

1. Lamar University is a Defendant-Petitioner in this suit. Lamar University was the Defendant in *Weaver v. Kelton*, supra, where the same State statute was challenged and where a Three-Judge Court was empaneled and found adversely to Plaintiffs holding that a substantial federal question was not presented which had not already been answered by *Starnes v. Malkerson*, supra.

2. The opinion below states on page 3 that *Starnes* was decided on somewhat different facts from those alleged in the case at bar. However, the statutes which are challenged are substantially the same and a substantial constitutional question does not necessarily arise because a plaintiff alleges that a college registrar misapplies the tuition statutes to his facts.

3. Any appeal from a student-resident classification for tuition purposes by a college registrar should be made in State Court where the appeal is based upon personal facts applying to each student and where the constitutional validity of the applicable statutes have already been approved in federal court.

ARGUMENTS AND AUTHORITIES

The challenged sections of the Texas Education Code, Sections 54.051 through 54.056 are reprinted for consideration together as follows:

Section 54.051. Tuition Rates

"(a) The governing board of each institution of higher education shall cause to be collected from students registering at the institution tuition or registration fees at the rates prescribed in this section.

"(b) Tuition for resident students, except as otherwise hereinafter provided, is $4 per semester credit hour, but the total of such charge shall not be less than $50 per semester.

"(c) Tuition for nonresident students, except as otherwise hereinafter provided, is $40 per semester credit hour.

"(d) Resident or nonresident students registered for thesis or dissertation credit only, in those instances where such credit is the final credit hour requirement for the degree in progress, shall pay a sum proportionately less than herein prescribed but not more than $50.

"(e) Tuition for resident students registered in a medical or dental branch, school or college is $400 per academic year of 12 months.

"(f) Tuition for nonresident students registered in a medical or dental branch, school or college is $1,200 per academic year of 12 months.

"(g) Resident or nonresident students registered for a course or courses in art, architecture, drama, speech, or music, where individual coaching or instruction is the usual method of instruction, shall pay a fee in addition to the regular tuition, said fee to be designated by the governing board of such institution; but in no event shall such fees be more per course per semester of four and one-half months or per summer session than $75.

"(h) Tuition for students who are citizens of any country other than the United States of America is $14 per semester credit hour, but the total of such charge shall be not less than $200.

"(i) Tuition for students who are citizens of any country other than the United States of America registered in a medical or dental branch, school or college is $800 per academic year of 12 months.

"(j) Tuition for nonresident students registered

in a public junior college is as provided in Subsection (b), Section 130.003 of the Texas Education Code.

"(k) Tuition for students registered in a school of nursing as a nursing student is $50 per semester and per 12-week summer session.

"(l) Tuition for students registered in a school of nursing as a nursing student for less than 12 semester credit hours of work or for less than a full semester credit hour or term hour load during a summer session shall pay an amount proportionately less than the amount provided in Subsection (k) of this section, but not less than $20.

"(m) Twenty-five cents out of each hourly charge in Subsection (b) and $1.50 out of each hourly charge in Subsection (c) of this section shall be placed in a scholarship fund at each institution to be administered by that institution to award scholarships to needy students. Standards for determining need shall be formulated by each institution. No more than 10 percent of said scholarship funds may be allocated to out-of-state students.

"(n) Notwithstanding the preceding provisions of this section, any nonresident student who is enrolled for the spring semester of 1971 in an institution covered by this section may continue to enroll at the same institution at the same tuition rate that was effective at the time of his original enrollment until one of the following conditions first occurs:

(1) he receives the degree at the degree level (i. e., the baccalaureate, master's, or doctoral degree) toward which he is working during the spring semester of 1971; or

(2) he voluntarily withdraws from the institution or the institution involuntarily withdraws the student for disciplinary reasons or for failing to meet the academic standards of the institution; or

(3) the termination of the spring semester of 1975.

"(o) A teaching assistant, research assistant, or other student employee of any institution covered by this section is entitled to register himself, his spouse, and their children in a state institution of higher education by paying the tuition fees and other fees or charges required for Texas residents, without regard to the length of time he has resided in Texas; provided that said student employee is employed at least one-half time in a position which relates to his degree program under rules and regulations established by the employer institution. This exemption shall continue for students employed two consecutive semesters through the summer session following such employment if the institution is unable to provide employment and, as determined under standards established by the institution, if the employee has satisfactorily completed his employment.

"(p) A nonresident student holding a competitive scholarship of at least $200 for the academic year or summer for which he is enrolled is entitled to pay the fees and charges required of Texas residents without regard to the length of time he has resided in Texas, provided that he must compete with other students, including Texas residents, for the scholarship and that the scholarship must be awarded by a scholarship committee officially recognized by the administration of the institution of higher education."

Amended by Acts 1971, 62nd Leg., p. 3352, ch. 1024, art. 2, §29, eff. Sept. 1, 1971.

Section 54.052. Residents; Nonresidents; General Rules

"(a) The term 'residence,' as used in this subchapter, means 'domicile.' The term 'resided in' means 'domiciled in.' For the purposes of this subchapter, the status of a student as a resident or nonresident student is determined as prescribed by this section, subject to the other applicable provisions of this subchapter.

"(b) An individual under 21 years of age who is living away from his family and whose family resides in another state or has not resided in Texas for the 12-month period immediately preceding the date of registration shall be classified as a nonresident student.

"(c) An individual 21 years of age or under whose family has not resided in Texas for the 12-month period immediately preceding the date of registration shall be classified as a nonresident student, regardless of whether he has become the legal ward of residents of Texas or has been adopted by residents of Texas while he is attending an educational institution in Texas, or within a 12-month period before his attendance, or under circumstances indicating that the guardianship or adoption was for the purpose of obtaining status as a resident student.

"(d) An individual 21 years of age or over who has come from outside Texas and who is gainfully employed in Texas for a 12-month period immediately preceding registration in an educational institution shall be classified as a resident student

as long as he continues to maintain a legal residence in Texas.

"(e) An individual 21 years of age or over who resides out of the state or who has come from outside Texas and who registers in an educational institution before having resided in Texas for a 12-month period shall be classified as a nonresident student."

Section 54.053. Regulations of Coordinating Board

"The governing board of each institution required by this chapter to charge a nonresident tuition or registration fee is subject to the rules, regulations, and interpretations issued by the Coordinating Board, Texas College and University System, for the administration of the nonresident tuition provisions of this subchapter. The rules, regulations, and interpretations promulgated by the coordinating board shall be furnished to the presidents or administrative heads of all Texas public senior or junior colleges and universities."

Section 54.054. Nonresident Status: Presumption; Reclassification

"A nonresident student classification is presumed to be correct as long as the residence of the individual in the state is primarily for the purpose of attending an educational institution. After residing in Texas for at least 12 months, a nonresident student may be reclassified by the Coordinating Board, Texas College and University System. Any individual reclassified as a resident student is entitled to pay the tuition fee for a resident of Texas at any subsequent registration as long as he continues to maintain his legal residence in Texas. Before February 15, 1972, the Coordinating Board,

Texas College and University System, shall promulgate such rules and regulations."

Amended by Acts 1971, 62nd Leg., p. 3353, ch. 1024, art. 2, §29, eff. Sept. 1, 1971.

Section 54.055. Parents, Change of Residence to Another State

"An individual 21 years of age or under whose parents were formerly residents of Texas is entitled to pay the resident tuition fee following the parents' change of legal residence to another state, as long as the individual remains continuously enrolled in a regular session in a state-supported institution of higher education."

Amended by Acts 1971, 62nd Leg., p. 3354, ch. 1024, art. 2, §29, eff. Sept. 1, 1971.

Section 54.056. Effect of Marriage

"A nonresident who marries and remains married to a resident of Texas, classified as such under this chapter at the time of the marriage and at the time the nonresident registers, is entitled to pay the resident tuition fee regardless of the length of time he has lived in Texas; and any student who is a resident of Texas and who marries a nonresident is entitled to pay the resident tuition fee as long as he does not adopt the legal residence of the spouse in another state."

The primary constitutional challenge is directed by the Plaintiff-Respondents at Section 54.052 above which describes the status of a student as a resident and a nonresident for tuition purposes.

Section 54.054 allows a nonresident student to be reclassified as a resident student for tuition purposes after residing in Texas for at least 12 months under the provisions set out in the rules and regulations adopted by the Coordinating Board, Texas College and University System.

QUESTIONS PRESENTED ARE RE-STATED FOR ARGUMENT TOGETHER

Where the laws of the State, which are challenged in the Complaint on constitutional grounds, have been recently upheld as constitutionally valid by a Three-Judge Court and by the United States Supreme Court in a recent similar case, is the District Court judicially in error to dismiss the Complaint on the basis that no substantial federal question remains to be decided?

Does an alleged misapplication of valid Texas statutes which prescribe resident requirements for tuition purposes in Texas Colleges constitute a violation of Plaintiff-Respondents constitutional rights such as to present a substantial federal question for the determination of a Three-Judge Court?

It is the contention of Petitioners that the District Court was correct in holding that *Starnes v. Malkerson*, supra, and *Weaver v. Kelton*, supra, have answered all of the substantial constitutional challenges brought by Plaintiffs-Respondents against the above Texas statutes of the Education Code and that therefore the constitutional claims brought in the instant suit are insubstantial.

This Court affirmed the findings and holdings of a Three-Judge Court in *Starnes v. Malkerson*, supra, in the following respects:

1. In answering the Plaintiff's assertion that the Court was dealing with the infringement of a basic, fundamental right—the right to interstate movement—and that we must apply the "compelling state interest" test, the above Court distinguished *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22L.Ed.2d 600 (1969) from *Starnes*, supra, and said *Starnes* was not a case of an infringement of a fundamental right and that the exacting standards of the compelling state interest test have no application.

The Court said that unlike *Shapiro* they found the one-year durational residence requirement challenged in *Starnes* did not constitute a penalty upon the exercise of the constitutional right of interstate travel and that the regulation's constitutionality should be tested under the traditional equal protection standards, citing *Shapiro v. Thompson*, supra, 394 U.S. at 638, n 21, 89 S.Ct. 1322.

2. In approaching the challenge by Plaintiffs that the statutory discrimination was a violation of Plaintiff's Equal Protection rights, the Court in *Starnes* cited *Morey v. Doud*, 354 U.S. 457, 465, 77 S.Ct. 1344, 1350, 1 L.Ed.2d 1485 (1957), *Reynolds v. Sims*, 377 U.S. 533, 565, 84 S.Ct. 1362, 1383, 12L.Ed.2d. 506 (1964), *Avery v. Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 1145 (1968), *Carrington v. Rash*, 380 U.S. 89, 92, 85 S.Ct. 775, 778, 13 L.Ed.2d 675 (1965), *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1158, 25 L.Ed.2d 491 (1970), *Lindsey v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 31 S.Ct. 337, 340, 55 L.Ed. 369,

Metropolis Theare Co. v. City of Chicago, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443, 57 L.Ed. 730, and *McGowan v. Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393, and said that statutory discrimination must be based on differences that are reasonably related to the legitimate purposes and intent of the Act complained of, and that if the classification complained of has some reasonable basis it does not offend the Constitution simply because in practice it may result in some inequality. The Court quoted out of *McGowan v. Maryland*, supra: "a statutory discrimination will not be set aside if any state of facts, reasonably may be conceived to justify it."

3. In disposing of the challenge that the one-year waiting period to acquire resident status for tuition purposes is arbitrary and unreasonable to presume that a person who has not resided within the state for a year is a nonresident student, and that it is reasonable to require that to rebut this presumption the student must be a bona fide domiciliary of the State for one year.

The regulation provides that an out-of-state student enrolled in the University is considered to be in the State primarily for the purpose of attending school, and is presumed not to be in the State as a permanent resident. This presumption can be overcome if the student provides sufficient evidence to show bona fide domiciliary within the State, one element of which is proof that he has resided within the State for a period of one year. In this requirement the Court found no arbitrary or permanent classification of the type found to constitute invidious discrimination in *Carrington v. Rash*, supra.

4. In the *Starnes* case the Court disposed of the question of whether the classification of the plaintiffs as nonresident students for tuition purposes is

reasonably related to a legitimate objective of the State. *McGowan v. Maryland*, supra, was further cited on the point of law that *it is enough that a solid foundation for the State regulation can be found in any one of the grounds set forth* (366 U.S. at 426), and then, in accordance with *Kirk v. Board of Regents of University of California*, 273 Cal.App.2d 430, 78 Cal.Rptr. 260 (1969), App. dismissed for want of a substantial federal question, 396 U.S. 554, 90 S.Ct. 754, 24 L.Ed.2d 247 (1970), which held that the State regulation classifying students as residents or nonresidents for tuition purposes is not arbitrary or unreasonable and bears a rational limitation to the States objective and purpose of financing, operating, and maintaining its many publicly financed educational institutions of higher learning.

All of the substantial constitutional challenges contained in the instant suit have been dealt with and were dealt with in *Starnes* and *Weaver* along with the cases cited therein, and the District Court was correct in finding that a substantial federal question did not remain for action by the Court.

There is nothing sufficiently alleged in Plaintiff-Respondents Complaint which would constitute a violation of a fundamental constitutional right. Any regulation by the State of Texas of the residence of students for tuition purposes is reasonable and bears a rational limitation to the State's purposes and objectives of the Act.

The Court below erred in not affirming the action by the District Court. Alleged misapplication of the Sta-

tutes by the College Registrars does not present a substantial federal question for action by the Federal Courts. It is a State matter.

CONCLUSION

All of the substantial constitutional challenges contained in the Complaint of the instant suit were answered in *Starnes*, supra, and *Weaver*, supra, and the cases cited therein, all of which were relied upon by the District Court in dismissing the suit for lack of a substantial federal question remaining for action by the Court.

The Court below erred in reversing the Order of the District Court upon the grounds that alleged misapplication of the statutes complained of by the College Registrars presented a further federal question for action by the federal courts.

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CERTIFICATE OF SERVICE

I, SAM L. JONES, JR., one of the attorneys for the Petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ___ day of March, 1974, a true and correct copy of the foregoing Petition for Writ of Certiorari To The United States Court Of Appeals for the Fifth Circuit was served upon Peter D. Williamson, 1320 Americana Building, Houston, Texas, 77002, Attorney for Respondents, by placing same in the United States Certified Mail with sufficient postage attached.

SAM L. JONES, JR.